# AUTHOR INDEX

## FEDERAL COURTS, PRACTICE & PROCEDURE

*Marder, Nancy S.*, Bringing Jury Instructions into the Twenty-First Century ... 449
*Tidmarsh, Jay*, Pound's Century, and Ours ... 513
*Wheatman, Shannon R. & Willging, Thomas E.*, Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make? ... 591
*Willging, Thomas E. & Wheatman, Shannon R.*, Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make? ... 591

## THE (RE)TURN TO HISTORY IN RELIGION CLAUSE LAW & SCHOLARSHIP

*Green, Steven K.*, "Bad History": The Lure of History in Establishment Clause Adjudication ... 1717
*Hamilton, Marci A. & Steamer, Rachel*, The Religious Origins of Disestablishment Principles ... 1755
*Laycock, Douglas*, Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause ... 1793
*Smith, Steven D.*, The Jurisdictional Establishment Clause: A Reappraisal ... 1843
*Steamer, Rachel & Hamilton, Marci A.*, The Religious Origins of Disestablishment Principles ... 1755
*Strang, Lee J.*, Introduction ... 1697

## ARTICLES & ESSAYS

*Chen, Jim*, The Parable of the Seeds: Interpreting the Plant Variety Protection Act in Furtherance of Innovation Policy ... 105
*Clark, Bradford R.*, Constitutional Structure, Judicial Discretion, and the Eighth Amendment ... 1149
*Cook, Julian A., III*, Crumbs From the Master's Table: The Supreme Court, Pro Se Defendants and the Federal Guilty Plea Process ... 1895
*Cunningham, Lawrence A.*, The Common Law as an Iterative Process: A Preliminary Inquiry ... 747
*Eisen, Joanne D., Kopel, David B. & Gallant, Paul*, Is Resisting Genocide a Human Right? ... 1275
*Engler, Mitchell L. & Stark, Stewart E.*, Property Tax Reassessment: Who Needs It? ... 1037
*Fee, John*, Eminent Domain and the Sanctity of Home ... 783
*Ferguson, Katharine, Lawson, Gary & Montero, Guillermo A.*, "Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the *Mathews v. Eldridge* and *Penn Central* Frameworks ... 1

*Gallant, Paul, Kopel, David B. & Eisen, Joanne D.*, Is Resisting Genocide a Human Right? ..... 1275
*Gatter, Robert*, The Mysterious Survival of the Policy Against Informed Consent Liability for Hospitals ..... 1203
*Gibson, James*, Once and Future Copyright ..... 167
*Henning, Kristin*, Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases ..... 245
*Kopel, David B., Gallant, Paul & Eisen, Joanne D.*, Is Resisting Genocide a Human Right? ..... 1275
*Krent, Harold J.*, The Continuity Principle, Administrative Constraint, and the Fourth Amendment ..... 53
*Kwall, Roberta Rosenthal*, Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul ..... 1945
*Lawson, Gary, Ferguson, Katharine & Montero, Guillermo A.*, "Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the *Mathews v. Eldridge* and *Penn Central* Frameworks ..... 1
*Magliocca, Gerard N.*, Constitutional False Positives and the Populist Moment 821
*McDonald, Barry P.*, Speech and Distrust: Rethinking the Content Approach To Protecting the Freedom of Expression ..... 1347
*Montero, Guillermo A., Lawson, Gary, & Ferguson, Katharine*, "Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the *Mathews v. Eldridge* and *Penn Central* Frameworks ..... 1
*Murphy, Jane C.*, Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children ..... 325
*Parker, Wendy*, Lessons in Losing: Race Discrimination in Employment ..... 889
*Ribstein, Larry E.*, Accountability and Responsibility in Corporate Governance ..... 1431
*Sadat, Leila Nadya*, Exile, Amnesty and International Law ..... 955
*Segal, Uzi & Stein, Alex*, Ambiguity Aversion and the Criminal Process ..... 1495
*Stein, Alex & Segal, Uzi*, Ambiguity Aversion and the Criminal Process ..... 1495
*Sterk, Stewart E. & Engler, Mitchell L.*, Property Tax Reassessment: Who Needs It? ..... 1037

## NOTES

*Danella, Nicholas A.*, Smoked Out: Bars, Restaurants, and Restrictive Antismoking Laws as Regulatory Takings ..... 1095
*Durham, Dory Mitros*, The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts ..... 655
*Enright, Anthony J.*, The Originalist's Dilemma: *Katz* and the New Approach to the State Sovereign Immunity Defense ..... 1553
*Foster, Brian E.*, Serious Mischiefs: *Exxon Mobil Corp. v. Allapattah Services, Inc.*, Supplemental Jurisdiction, and Breaking the Promise of *Finley* ..... 2013
*Glessner, Michele M.*, One Size Does Not Fit All: Keeping the "Totality of the Circumstances" Test for Public Use Cases After *Pfaff* and *SmithKline* ... 387
*Hill, Alison*, Banishment: Stopping Stalkers at the County Line ..... 1123
*Judge, Stephen M.*, Codex Imaginarius: Visual Codes in Land Use Planning and Aesthetic Regulation ..... 1595
*Killen, Matthew M.*, Intolerable Cruelties: Retaliatory Actions in First Amendment Public Employment Cases ..... 1629

*Lawson, Jonathan S.*, Eight Million Performances Later, Still Not a Dime: Why It Is Time To Comprehensively Protect Sound Recording Public Performances ..... 693
*Mallen, Travis H.*, Rediscovering the Nondelegation Doctrine Through a Unified Separation of Powers Theory ..... 419
*Mathues, G. David*, Shadow of a Bulldozer?: RLUIPA and Eminent Domain After *Kelo* ..... 1653
*Morrissey, Brian P., Jr.*, Speech and Taxes: Balancing Freedom of Conscience and Government Speech After *Johanns v. Livestock Marketing Association* ..... 2059
*Simone, Patricia E.*, A Presumptive Constitutional Time Limit for Administrative Overdetention of Inmates Entitled to Release ..... 719
*Stuckey, Tara M.*, Jurisdictional Hooks in the Wake of *Raich*: On Properly Interpreting Federal Regulations of Interstate Commerce ..... 2101

# SUBJECT INDEX

## ARTS & LITERATURE

*Kwall, Roberta Rosenthal,* Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul ..... 1945
*Lawson, Jonathan S.,* Eight Million Performances Later, Still Not a Dime: Why It Is Time To Comprehensively Protect Sound Recording Public Performances ..... 693

## BANKRUPTCY LAW

*Enright, Anthony J.,* The Originalist's Dilemma: *Katz* and the New Approach to the State Sovereign Immunity Defense ..... 1553

## CIVIL RIGHTS & DISCRIMINATION

*Killen, Matthew M.,* Intolerable Cruelties: Retaliatory Actions in First Amendment Public Employment Cases ..... 1629
*Parker, Wendy,* Lessons in Losing: Race Discrimination in Employment ..... 889

## COMPARATIVE LAW

*Kwall, Roberta Rosenthal,* Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul ..... 1945

## COMPUTER LAW

*Gibson, James,* Once and Future Copyright ..... 167

## CONSTITUTIONAL LAW

*Clark, Bradford R.,* Constitutional Structure, Judicial Discretion, and the Eighth Amendment ..... 1149
*Cook, Julian A., III,* Crumbs From the Master's Table: The Supreme Court, Pro Se Defendants and the Federal Guilty Plea Process ..... 1895
*Danella, Nicholas A.,* Smoked Out: Bars, Restaurants, and Restrictive Antismoking Laws as Regulatory Takings ..... 1095
*Enright, Anthony J.,* The Originalist's Dilemma: *Katz* and the New Approach to the State Sovereign Immunity Defense ..... 1553
*Fee, John,* Eminent Domain and the Sanctity of the Home ..... 783
*Ferguson, Katharine, Lawson, Gary & Montero, Guillermo A.,* "Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the *Mathews v. Eldridge* and *Penn Central* Frameworks ..... 1
*Foster, Brian E.,* Serious Mischiefs: *Exxon Mobil Corp. v. Allapattah Services, Inc.,* Supplemental Jurisdiction, and Breaking the Promise of *Finley* ..... 2013

*Green, Steven K.*, "Bad History": The Lure of History in Establishment Clause Adjudication ..... 1717
*Hamilton, Marci A. & Steamer, Rachel*, The Religious Origins of Disestablishment Principles ..... 1755
*Killen, Matthew M.*, Intolerable Cruelties: Retaliatory Actions in First Amendment Public Employment Cases ..... 1629
*Krent, Harold J.*, The Continuity Principle, Administrative Constraint, and the Fourth Amendment ..... 53
*Lawson, Gary, Ferguson, Katharine & Montero, Guillermo A.*, "Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the *Mathews v. Eldridge* and *Penn Central* Frameworks ..... 1
*Laycock, Douglas*, Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause ..... 1793
*Magliocca, Gerard N.*, Constitutional False Positives and the Populist Moment 821
*Mallen, Travis H.*, Rediscovering the Nondelegation Doctrine Through a Unified Separation of Powers Theory ..... 419
*Mathues, G. David*, Shadow of a Bulldozer?: RLUIPA and Eminent Domain After *Kelo* ..... 1653
*McDonald, Barry P.*, Speech and Distrust: Rethinking the Content Approach To Protecting the Freedom of Expression ..... 1347
*Montero, Guillermo A., Lawson, Gary & Ferguson, Katharine*, "Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the, *Mathews v. Eldridge* and *Penn Central* Frameworks ..... 1
*Morrissey, Brian P., Jr.*, Speech and Taxes: Balancing Freedom of Conscience and Government Speech After *Johanns v. Livestock Marketing Association* ..... 2059
*Segal, Uzi & Stein, Alex*, Ambiguity Aversion and the Criminal Process ..... 1495
*Simone, Patricia E.*, A Presumptive Constitutional Time Limit for Administrative Overdetention of Inmates Entitled to Release ..... 719
*Smith, Steven D.*, The Jurisdictional Establishment Clause: A Reappraisal ..... 1843
*Steamer, Rachel & Hamilton, Marci A.*, The Religious Origins of Disestablishment Principles ..... 1755
*Stein, Alex & Segal, Uzi*, Ambiguity Aversion and the Criminal Process ..... 1495
*Strang, Lee J.*, Introduction ..... 1697
*Stuckey, Tara M.*, Jurisdictional Hooks in the Wake of *Raich*: On Properly Interpreting Federal Regulations of Interstate Commerce ..... 2101

## CORPORATE LAW

*Ribstein, Larry E.*, Accountability and Responsibility in Corporate Governance ..... 1431

## CRIMINAL LAW & PROCEDURE

*Clark, Bradford R.*, Constitutional Structure, Judicial Discretion, and the Eighth Amendment ..... 1149
*Cook, Julian A., III*, Crumbs From the Master's Table: The Supreme Court, Pro Se Defendants and the Federal Guilty Plea Process ..... 1895
*Hill, Alison*, Banishment: Stopping Stalkers at the County Line ..... 1123
*Krent, Harold J.*, The Continuity Principle, Administrative Constraint, and the Fourth Amendment ..... 53

*Segal, Uzi & Stein, Alex*, Ambiguity Aversion and the Criminal Process ..... 1495
*Stein, Alex & Segal, Uzi*, Ambiguity Aversion and the Criminal Process ..... 1495

## DISPUTE RESOLUTION

*Cunningham, Lawrence A.*, The Common Law as an Iterative Process: A Preliminary Inquiry ..... 747

## DOMESTIC RELATIONS

*Murphy, Jane C.*, Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children ..... 325

## ESTABLISHMENT CLAUSE

*Green, Steven K.*, "Bad History": The Lure of History in Establishment Clause Adjudication ..... 1717
*Hamilton, Marci A. & Steamer, Rachel*, The Religious Origins of Disestablishment Principles ..... 1755
*Laycock, Douglas*, Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause ..... 1793
*Smith, Steven D.*, The Jurisdictional Establishment Clause: A Reappraisal ..... 1843
*Steamer, Rachel & Hamilton, Marci A.*, The Religious Origins of Disestablishment Principles ..... 1755
*Strang, Lee J.*, Introduction ..... 1697

## FREEDOM OF SPEECH

*Killen, Matthew M.*, Intolerable Cruelties: Retaliatory Actions in First Amendment Public Employment Cases ..... 1629
*McDonald, Barry P.*, Speech and Distrust: Rethinking the Content Approach To Protecting the Freedom of Expression ..... 1347
*Morrissey, Brian P., Jr.*, Speech and Taxes: Balancing Freedom of Conscience and Government Speech After *Johanns v. Livestock Marketing Association* ..... 2059

## HEALTH LAW & POLICY

*Gatter, Robert*, The Mysterious Survival of the Policy Against Informed Consent Liability for Hospitals ..... 1203

## HUMAN RIGHTS LAW

*Eisen, Joanne D., Kopel, David B. & Gallant, Paul*, Is Resisting Genocide a Human Right? ..... 1275
*Gallant, Paul, Kopel, David B. & Eisen, Joanne D.*, Is Resisting Genocide a Human Right? ..... 1275
*Kopel, David B., Gallant, Paul & Eisen, Joanne D.*, Is Resisting Genocide a Human Right? ..... 1275

## INTELLECTUAL PROPERTY LAW

*Chen, Jim*, The Parable of the Seeds: Interpreting the Plant Variety Protection Act in Furtherance of Innovation Policy ..... 105
*Gibson, James*, Once and Future Copyright ..... 167
*Glessner, Michele M.*, One Size Does Not Fit All: Keeping the "Totality of the Circumstances" Test for Public Use Cases After *Pfaff* and *SmithKline* ... 387
*Kwall, Roberta Rosenthal*, Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul ..... 1945
*Lawson, Jonathan S.*, Eight Million Performances Later, Still Not a Dime: Why It Is Time To Comprehensively Protect Sound Recording Public Performances ..... 693

## INTERNATIONAL LAW

*Eisen, Joanne D., Kopel, David B. & Gallant, Paul*, Is Resisting Genocide a Human Right? ..... 1275
*Gallant, Paul, Kopel, David B. & Eisen, Joanne D.*, Is Resisting Genocide a Human Right? ..... 1275
*Kopel, David B., Gallant, Paul & Eisen, Joanne D.*, Is Resisting Genocide a Human Right? ..... 1275
*Sadat, Leila Nadya*, Exile, Amnesty and International Law ..... 955

## INTERNATIONAL TRADE

*Mallen, Travis H.*, Rediscovering the Nondelegation Doctrine Through a Unified Separation of Powers Theory ..... 419

## IMMIGRATION LAW

*Durham, Dory Mitros*, The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts ..... 655

## JUDGES

*Clark, Bradford R.*, Constitutional Structure, Judicial Discretion, and the Eighth Amendment ..... 1149
*Durham, Dory Mitros*, The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts ..... 655

## JURISPRUDENCE

*Cunningham, Lawrence A.*, The Common Law as an Iterative Process: A Preliminary Inquiry ..... 747

## JUVENILES

*Henning, Kristin*, Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases ..... 245

## LABOR & EMPLOYMENT LAW

*Killen, Matthew M.*, Intolerable Cruelties: Retaliatory Actions in First Amendment Public Employment Cases ..... 1629
*Parker, Wendy*, Lessons in Losing: Race Discrimination in Employment ..... 889

## LAND USE PLANNING

*Judge, Stephen M.*, Codex Imaginarius: Visual Codes in Land Use Planning and Aesthetic Regulation ..... 1595

## LEGAL HISTORY

*Green, Steven K.*, "Bad History": The Lure of History in Establishment Clause Adjudication ..... 1717
*Hamilton, Marci A. & Steamer, Rachel*, The Religious Origins of Disestablishment Principles ..... 1755
*Laycock, Douglas*, Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause ..... 1793
*Magliocca, Gerard N.*, Constitutional False Positives and the Populist Moment 821
*Smith, Steven D.*, The Jurisdictional Establishment Clause: A Reappraisal ..... 1843
*Steamer, Rachel & Hamilton, Marci A.*, The Religious Origins of Disestablishment Principles ..... 1755
*Strang, Lee J.*, Introduction ..... 1697

## LAW ENFORCEMENT & CORRECTION

*Hill, Alison*, Banishment: Stopping Stalkers at the County Line ..... 1123
*Simone, Patricia E.*, A Presumptive Constitutional Time Limit for Administrative Overdetention of Inmates Entitled to Release ..... 719

## LEGAL ANALYSIS & WRITING

*Tidmarsh, Jay*, Pound's Century, and Ours ..... 513

## LEGAL PROFESSION

*Henning, Kristin*, Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases ..... 245

## LEGISLATION

*Chen, Jim*, The Parable of the Seeds: Interpreting the Plant Variety Protection Act in Furtherance of Innovation Policy ..... 105
*Fee, John*, Eminent Domain and the Sanctity of the Home ..... 783
*Foster, Brian E.*, Serious Mischiefs: *Exxon Mobil Corp. v. Allapattah Services, Inc.*, Supplemental Jurisdiction, and Breaking the Promise of *Finley* ..... 2013
*Mathues, G. David*, Shadow of a Bulldozer?: RLUIPA and Eminent Domain After *Kelo* ..... 1653

## MEDICAL JURISPRUDENCE

*Gatter, Robert*, The Mysterious Survival of the Policy Against Informed Consent Liability for Hospitals ..... 1203

## POLITICS

*Magliocca, Gerard N.*, Constitutional False Positives and the Populist Moment 821

## PRACTICE & PROCEDURE

*Foster, Brian E.*, Serious Mischiefs: *Exxon Mobil Corp. v. Allapattah Services, Inc.*, Supplemental Jurisdiction, and Breaking the Promise of *Finley* ..... 2013
*Marder, Nancy S.*, Bringing Jury Instructions into the Twenty-First Century ... 449
*Tidmarsh, Jay*, Pound's Century, and Ours ..... 513
*Wheatman, Shannon R. & Willging, Thomas E.*, Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make? ..... 591
*Willging, Thomas E. & Wheatman, Shannon R.*, Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make? ..... 591

## PROPERTY—PERSONAL AND REALTY

*Danella, Nicholas A.*, Smoked Out: Bars, Restaurants, and Restrictive Antismoking Laws as Regulatory Takings ..... 1095
*Engler, Mitchell L. & Sterk, Stewart E.*, Property Tax Reassessment: Who Needs It? ..... 1037
*Fee, John*, Eminent Domain and the Sanctity of the Home ..... 783
*Ferguson, Katharine, Lawson, Gary & Montero, Guillermo A.*, "Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the *Mathews v. Eldridge* and *Penn Central* Frameworks ..... 1
*Judge, Stephen M.*, Codex Imaginarius: Visual Codes in Land Use Planning and Aesthetic Regulation ..... 1595
*Lawson, Gary, Ferguson, Katharine & Montero, Guillermo A.*, "Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the *Mathews v. Eldridge* and *Penn Central* Frameworks ..... 1
*Mathues, G. David*, Shadow of a Bulldozer?: RLUIPA and Eminent Domain After *Kelo* ..... 1653
*Montero, Guillermo A., Lawson, Gary & Ferguson, Katharine*, "Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the *Mathews v. Eldridge* and *Penn Central* Frameworks ..... 1
*Sterk, Stewart E. & Engler, Mitchell L.*, Property Tax Reassessment: Who Needs It? ..... 1037

## SCIENCE & TECHNOLOGY

*Chen, Jim*, The Parable of the Seeds: Interpreting the Plant Variety Protection Act in Furtherance of Innovation Policy ..... 105
*Gibson, James*, Once and Future Copyright ..... 167

## SOCIAL WELFARE

*Murphy, Jane C.*, Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children ..... 325

## STATUTORY INTERPRETATION

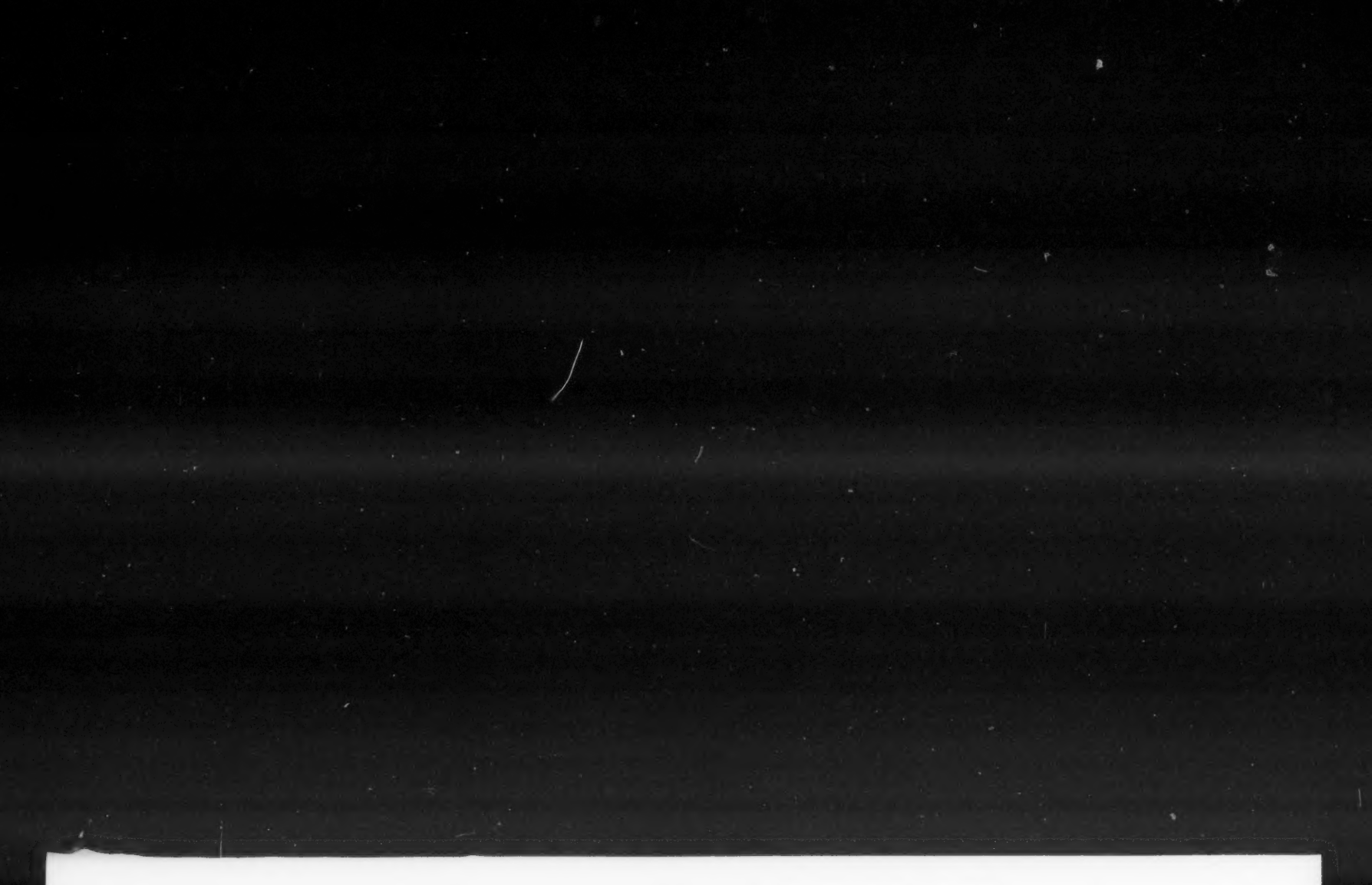
*Chen, Jim*, The Parable of the Seeds: Interpreting the Plant Variety Protection Act in Furtherance of Innovation Policy ..... 105

## TAXATION—STATE & LOCAL

*Engler, Mitchell L. & Sterk, Stewart E.*, Property Tax Reassessment: Who Needs It? ..... 1037
*Sterk, Stewart E. & Engler, Mitchell L.*, Property Tax Reassessment: Who Needs It? ..... 1037

## TORTS

*Gatter, Robert*, The Mysterious Survival of the Policy Against Informed Consent Liability for Hospitals ..... 1203

## TRADEMARK & COPYRIGHT LAW

*Gibson, James*, Once and Future Copyright ..... 167
*Glessner, Michele M.*, One Size Does Not Fit All: Keeping the "Totality of the Circumstances" Test for Public Use Cases After *Pfaff* and *SmithKline*... 387
*Kwall, Roberta Rosenthal*, Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul ..... 1945
*Lawson, Jonathan S.*, Eight Million Performances Later, Still Not a Dime: Why It Is Time To Comprehensively Protect Sound Recording Public Performances ..... 693